Filed 7/21/09 In re I.G. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re I.G., a Person Coming Under the Juvenile Court Law.	B213823 (Los Angeles County Super. Ct. No. CK66767)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Valerie Skeba, Juvenile Court Referee. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Denise M. Hippach, Senior Associate County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

C.S. (Father) appeals from an order terminating his parental rights over I.G. (Daughter) pursuant to Welfare and Institutions Code section 366.26.[1] He contends the order must be reversed due to the juvenile court's failure to comply with the Indian Child Welfare Act (ICWA, 25 U.S.C. § 1901 et seq.). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 2007, the Department of Children and Family Services (DCFS) filed a section 300 petition as to Daughter, then two years old. Daughter had resided with her maternal grandparents since her birth. The petition alleged the child's mother, A.G. (Mother), and Father had a history of domestic violence and substance abuse, and they had left Daughter in the care of the maternal grandparents with no provision for her care and supervision.[2]

The detention report indicated that Mother stated that neither she nor Father had Indian ancestry. Mother also signed a parental notification of Indian status stating that she had no Indian ancestry as far as she knew. Although Father was interviewed for the detention report, it contains no statement by him as to whether he had any Indian ancestry.

Following a hearing, the juvenile court ordered Daughter detained in the home of her maternal grandparents.

DCFS attempted to interview Father for the jurisdiction/disposition report. Father became angry when he read the petition and refused to cooperate. DCFS interviewed Father's parole officer, who stated that Father was on parole and was currently in

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[1] Unless otherwise stated, all section references are to the Welfare and Institutions Code.

[2] Mother is not a party to this appeal.

compliance with the conditions of his parole. DCFS later reported that ICWA did not apply.

Father failed to appear at the jurisdiction/disposition hearing on March 23, 2007. His court-appointed counsel indicated that he had not yet spoken with Father, who did not respond to letters counsel had written to him. The juvenile court sustained the petition and declared Daughter to be a dependent child of the court. It set out a reunification plan and visitation order.

For the September 21, 2007 six-month review hearing, DCFS reported Father had not contacted DCFS, had made no attempt to comply with the reunification plan and had not visited Daughter. His whereabouts were unknown. In addition, Mother claimed Father had beaten her in March, and the parole officer reported that Father was not in compliance with his parole and there was a warrant for his arrest. DCFS recommended termination of reunification services as to Father. DCFS also noted that, at the detention hearing, "the Court's Minute Order reflects, 'No ICWA or paternity findings made this date.' It is unclear if the Court has determined if ICWA applies to this case."

At the September 21 hearing, Father did not appear. The court indicated the matter would be continued to determine whether he qualified as a presumed father. It then asked whether Mother indicated that there was any Indian ancestry in her family. Her counsel said there was not, and the court found ICWA did not apply.

Father's whereabouts were still unknown at the October 19, 2007 hearing. The juvenile court terminated reunification services as to him. In November 2007, Father was arrested on outstanding warrants and imprisoned. On April 18, 2008, the court found him to be a presumed father.

By the 12-month review hearing on May 22, 2008, Mother had failed to comply with her reunification plan. The juvenile court terminated her reunification services and set a permanency planning hearing (§ 366.26).

Father was paroled in August 2008. On September 10, he filed a section 388 petition seeking reinstatement of his reunification services. The court set a hearing on the petition. It granted Father visitation pending the hearing.

On October 29, 2008, Daughter's attorney filed a section 388 petition seeking to terminate Daughter's visitation with Father due to Daughter's negative reaction to his visits.

Following an October 30, 2008 hearing at which Father testified, the juvenile court denied his section 388 petition. On December 3, the court held the permanency planning hearing, at which Father again testified. The court terminated Mother's and Father's parental rights. It took Daughter's section 388 petition off calendar as moot.

DISCUSSION

Defendant contends the juvenile court erred in failing to require compliance with ICWA prior to terminating his parental rights.

"The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families. Minimum federal standards, both substantive and procedural, effectuating these policies are set forth in the ICWA." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) Under ICWA, it is presumed that "it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*Ibid.*) Therefore, "[t]o ensure a tribe's right to intervene [in proceedings where an Indian child is involved], the ICWA requires 'where the court knows or has reason to know that an Indian child is involved,' the party seeking termination of parental rights must, in relevant part, notify the Indian child's tribe of the pending proceedings and its right to intervene." (*Ibid.*) This notice "enables the tribe to investigate and determine whether the minor is an Indian child" and gives the tribe the opportunity to intervene. (*Id.* at p. 470.) Failure to provide the necessary notice requires invalidation of actions taken in violation of the ICWA. (*Id.* at p. 472; see Cal. Rules of Court, rule 5.481.)

The notice requirements are triggered when the court has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (c).) To comply with ICWA, the juvenile court has "an affirmative and continuing duty to inquire whether a child for

whom a petition under section 300 . . . has been[] filed is or may be an Indian child in all dependency proceedings . . . ." (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(a).) When a parent appears in the proceedings, the court must order the parent to complete a parental notification of Indian status form. (Cal. Rules of Court, rule 5.481(a).)

Father contends that his failure to raise the issue below does not waive his claim of error on appeal, and the juvenile court's failure to inquire of him whether he had Native American heritage is jurisdictional error. DCFS counters that its duty of inquiry was thwarted by Father's lack of cooperation and unavailability for most of the proceedings below, but it and the court nonetheless met their duties by inquiring of Mother whether Father had any Native American heritage. DCFS also asserts that any error was harmless, in that Father has never—either below or on appeal—claimed Native American heritage.

We agree that the issue of compliance with the ICWA was not waived by Father's failure to raise it below. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 260-261; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 734-735.) We also agree that the juvenile court erred in not inquiring of Father whether he had any Native American heritage and requiring him to fill out a parental notification of Indian status. (*In re J.N.* (2006) 138 Cal.App.4th 450, 460-461.) We reject Father's claim that the asserted failure to comply with the duty of inquiry constituted jurisdictional error, however. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 384.)

Father contends that this error requires, at a minimum, a remand for compliance with these mandates. (*In re J.N.*, *supra*, 138 Cal.App.4th at pp. 461-462.) We disagree.

In *In re J.N.*, *supra*, it was "apparent from the record that mother was never asked whether she had any Indian ancestry." (138 Cal.App.4th at p. 461.) The appellate court "refuse[d] to speculate about what mother's response to any inquiry would be" and remanded the matter to the juvenile court to make the proper inquiry. (*Ibid*.)

This approach was rejected in *In re Rebecca R.* (2006) 143 Cal.App.4th 1426. As in that case, "[t]he sole reason an appellate court is put into a position of 'speculation' on the matter is the parent's failure or refusal to tell us. Father complains that he was not

asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, *if* he had been asked, [F]ather *would have* indicated that the child did (or may) have such ancestry.

"Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not.

"In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. The ICWA is not a 'get out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way. [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimus. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal." (*In re Rebecca R., supra*, 143 Cal.App.4th at p. 1431; accord, *In re N.E.* (2008) 160 Cal.App.4th 766, 770.)

We add that here, Father, in his reply brief, faced with the holding above of *Rebecca R.*, attempts to distinguish *Rebecca R.* rather than make a representation of Indian heritage. This convinces us that Father's claim of error is merely an attempt to delay termination of his parental rights and not an attempt to protect any rights his child would have to retain her tribal ties and cultural heritage if she were of Indian heritage (*In re Desiree F., supra*, 83 Cal.App.4th at p. 469). We thus conclude that any failure by the juvenile court to comply with ICWA was not prejudicial, so a remand for compliance

would be a meaningless gesture and unnecessary. (*In re N.E.*, *supra*, 160 Cal.App.4th at p. 771.)

DISPOSITION

The order is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.